

Chapter VI Of Exchanges

118. "Exchange" defined—When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange".

A transfer of property in completion of an exchange can be made only in the manner provided for the transfer of such property by sale.

Case Law

Section 118—If an exchange of lands is not effected by a registered instrument, that would not create any interest in favour of any party to the exchange as no valid title could be created on the basis of an oral exchange. *Jabed Ali Bepari vs Abdul Bari Bepari*, 19 DLR 192.

—Exchange—Delivery must be physical and not constructive.

A delivery to validate and an exchange must be a physical and not a constructive delivery. There can therefore, be no exchange by means of delivery of possession of property which cannot be described as tangible. *Debi Prasad vs Jaldhar Chube*. AIR 1946 All 125.

A mutual transfer of immovable property between two persons amount to an exchange and each party acquires, on execution of the deed of transfer in his favour, a good title to

the property. 60 IC 725—7 OJ 699. It is not necessary for a transaction of exchange that there should be two separate deeds by the two parties thereto; and an exchange cannot be inoperative, only because of a defect in the title of one of the parties to it. 113 IC, 753—1929 A. 63(2). In a sale, the price is paid in money; in exchange by way of barter for other goods or property. 25 B. 696. Where what is exchanged for is both land and money, the transaction is an exchange and not sale. 50 IC 288; 199 PLR 1913—19 IC 301; 86 IC 266—1925 L 326. See also 3 NLR 138; 1930 A 426(2).

Transfer in consideration of forbearance to take certain legal proceedings is not an exchange. 54 M 163—1931 M 140—60 MLJ 56. Where land is given in exchange for right of easement, registered document is not necessary. 92 IC 672—1926 M 543. An exchange of property more than Rs 100 in

value must be by registered instrument; otherwise the parties can get back their respective lands, even though structures have been raised, after paying compensation. *40 M 1134—33 MLJ 252*. [But see section 53 A] See also *90 IC 131—49 MLJ 150; 25 C 210; 38 M 519*; Where the exchange of land accompanied by delivery of possession was acted on for more than 30 years and there was nothing to show that the value of the land at the time of exchange was Rs. 100 or upwards, the exchange though not evidenced by a registered instrument, is valid under section 118 read with section 54, Transfer of Property Act. *8 OWN 1275*. See also *30 IC 408; 38 M 519; 29 Bom. 1419*.

Now under section 53A on the principle of the doctrine of part-performance, protection would be afforded to the party defrauded if the conditions of section 53A are satisfied. See *42 C 801 (PC); 40 A. 187; 121 IC 765—1930 M 1*. In an exchange one is not the price of the other, so pre-emption will not apply to exchanges. *18 OC 109—30 IC 232*. Partition of joint family property is not an exchange. *10 CLJ 503*.

As to difference between partition and exchange, see also *25 C 210*. Gift of land to wife, limited to enjoyment for lifetime, in lieu of her maintenance right is not exchange. *45 M 612*. Where possession by one party is not delivered, the remedy of the other is not specific performance, but a suit for declaration of title and for possession of his own property. *33 IC 762—20 CWN 657*. Exchange—Absence of registered instrument—Delivery of possession—Suit for declaration of title on the basis of possession—Maintainability. See *31 CWN 348*. An exchange entered into by the manager of a

joint Hindu family, which is not challenged by the other members of the family, is valid. *113 IC 753—1929 A 63*.

Section 118—Exchange of agricultural land with Ihata—Respondent transferred his share in Ihata while petitioner did not transfer in exchange his agricultural land—Respondent's suit was decreed by both Courts below wherein petitioner's objection with regard to bar of limitation did not find favour and was rejected—Respondent's suit was in time from date his title was denied by appellant—Concurrent findings of Courts below after appreciation of evidence on record that suit was not barred by time, called for no interference. *Anwar Hussain Shah vs Riaz Hussain Shah 1997 CLC 1481*.

Section 118—Entries in "Nikahnama" showing transfer of property in lieu of dower by husband to wife—Possession of property in question was given to wife in acknowledgment of dower—Husband's uncle claiming property in question on basis of exchange after wife had been divorced by her husband—Effect—Appellant claiming property in exchange did not appear in witness-box to answer charges of his conspiracy with husband of plaintiff (lady) and that he had trespassed and dispossessed her—Basic ingredients of claimed bona fide transfer for value without notice were missing—Appellant could not prove having made bona fide inquiries before alleged exchange and, on the contrary, exchange was made during pendency of plaintiff's suit—First Appellate Court, thus, had not committed any error of law in decreeing plaintiff's suit—No interference was warranted in impugned judgment. *Wali Dad vs Tasneem Kausar 1999 CLC 163*.

Section 118—Suit for possession—Exchange of land—Proof—Plaintiffs claimed possession of suit land on the basis of exchange agreement arrived at between predecessors-in-interest of parties but defendants denied the title of plaintiffs on basis of alleged exchange—Defendants had pleaded that alleged exchange was a temporary arrangement and never meant to take effect, but plaintiffs had proved that land in dispute was given in exchange which later on was sold away by defendants—Such claim of plaintiffs was not challenged in cross-examination—Plea raised by defendants was proved to be false whereas statement made on oath by one of the plaintiffs with regard to exchange transaction was fully supported by the documentary evidence on record—Courts below having misread evidence on record, concurrent judgments and decrees passed by them were set aside by High Court in exercise of its revisional jurisdiction and suit was decreed. *Pervez Alam Khan vs Muhammad Mukhtar Khan* 2001 CLC 1489.

Sections 118 & 119—Mutual exchange of two acres of land each by predecessor of petitioners and respondent—Respondent was found to be owner of one acre of land out of land given by him in exchange during subsequent consolidation proceedings—Petitioners thereafter filed suit claiming specified amount as price of land which they had lost being not owned by respondent—Petitioner's suit was decreed in terms of their prayer—Finding of trial Court was, however, reversed in appeal—Validity—Appellate Court without touching merit of findings proceeded to allow appeal on supposition that suit for specific performance should have been brought—Appellate Court having

maintained finding of trial Court that respondent owned only one acre of land, and petitioner's having lost portion of land which they were entitled to receive in exchange, Trial Court had competently exercised its jurisdiction and granted relief to petitioners to which they were entitled in equity—Provision of section 119, Transfer of Property Act, 1882, confers right on party to exchange who has been by reason of any defect in title of any party deprived of the thing received by him in exchange, to claim compensation for the loss caused thereby or at his option for the return of thing transfer of same was still in possession of such other party or his legal representatives or transferee from him without consideration—Judgment and decree of appellate Court whereby petitioner's suit was dismissed was set aside while that of trial Court decreeing petitioner's suit was restored in circumstances. *Salehoon vs Sardara PLJ 1999 Lah. 1747 = NLR 1999 Civil 626.*

Sections 118 & 119—Exchange—what it is—An exchange is a mutual transfer between two persons of the ownership of properties, but either both the things should be money or neither of them should be money. A party to the exchange when deprived of the thing received in exchange has his remedy under section 119. A third party too can raise the question of title of a party to the exchange. *Sahera Khatun and another vs Anwara Khatun & others* 44 DLR (AD) 86.

Sections 118 and 119—The trial Court having had the opportunity of seeing the demeanour of the witnesses believed the case of the pre-emptor that the alleged transfer was an out and out sale holding correctly that

the deed of sale describing it as an ewaj cannot stand in the way of the exercise of the right of pre-emption under section 96 of the State Acquisition and Tenancy Act as the opposite party Nos. 1 and 2 resorted to a

clever device in describing the said deed as one of exchange instead of a Kabala or a sale deed with a view to defeating the right of pre-emption. *Daulat Ahmed and others vs Md Mosharraf Hossain and others* 3 BLC 43

¹[119. Right of party deprived of thing received in exchange—

If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.]

Case Law

Section 119—Exchange of property— Provision of section 119 applicable so long as property remains in hands of person to whom it had been given in exchange and not after he has parted with same in favour of third person—Exchange of land between **A & B**— Exchange deed covenanting "if any loss is sustained by one party due to any factual or legal flaw in title to land, each would be liable for any loss sustained by the other"— Liability created by covenant, held, "personal" and not "running with land"

exchanged—Provisions of section 119, held, not attracted. *Muhammad Shah vs Sher Muhammad*, (1969) 21 PLD (Peshawar) 103.

The law applicable to exchanges of immovable property prior to the passing of the Transfer of Property Act is the common Law of England and not the Real Property Act. Such an exchange implied a warranty of title, a condition for re-entry on the land given in exchange and also the right to certain compensation for breach of the warranty.

1. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 59, for the original section.

Section 119 of the Act preserved to the parties in India the English Common Law right as to warranty. Section 119 embodies rules of "justice, equity and good conscience," and may apply to exchange effected prior to the Act. *31 MLJ 380—35 IC 92*.

Section 119 before amendment related only to the rights of the parties to the exchange *inter se* and there is no reason for holding that it was intended to relate to a third person not bound by an exchange to which he was not a party. Therefore, the principle of that section did not apply to an innocent transferee for value from one of the parties to the exchange. *1934 L 394(2)*. Section 119 does not exclude an innocent purchaser into whose hands the property exchanged might pass. *(1940) 1 MLJ 248*. Section 119, as it stood before the amendment of the Act in 1929, should not be interpreted in the light of the subsequent change in the law, and the fact that the dispossession of the plaintiff took place after the amendment would not make the amended section applicable, where the transaction of exchange was effected long prior to it. *1940 M 426—(1940) 1 MLJ 248*. Section in effect declares that there is a warranty of title by each party in respect of the property he has parted with in exchange for the other man's property. *31 MLJ 380*.

But this is subject to the special terms of any contract which the parties may enter into in respect of the properties exchanged. *21 M 69; 42 IC 248*. On the completion of the transaction of exchange, right to the property becomes vested in the parties and he then gets a right to sue for recovery of possession; and if thereafter a party is deprived of the property which he got in exchange, he will be

entitled under section 119 to compensation or to the return of the property in dispute transferred by him to the other party. *113 IC 753—1929 A 63(2)*. Where the guardian of a minor exchanges his property for another and he is subsequently dispossessed of it, his remedy is not to sue to set aside the alienation, but under section 119 for compensation or for getting back his land. *1924 B 517*. For purposes of section 43 an exchange stands on same footing as a sale. *60 IC 819—33 CLJ 184*. In every exchange there is warranty of title. Where part is lost, the whole exchange is to be avoided or compensation is to be recovered. But an equivalent portion alone cannot be recovered back. *51 PR 1917—41 IC 248*. As to whether charge is created when the transaction is not valid in law, see *38 M 519—30 IC 408; 42 M 690*. Where the covenant provided for the return of the respective properties exchanged in the event of any one being obstructed in enjoyment of his exchanged lands, a vendee from one cannot plead *bona fide* and want of notice. Article 147 of the Limitation Act would apply to the enforcement of the covenant. *51 IC 939—42 M 690*.

Sections 119 & 118—Exchange—what it is—An exchange is a mutual transfer between two persons of the ownership of properties, but either both the things should be money or neither of them should be money, a party to the exchange when deprived of the thing received in exchange has his remedy under section 119. A third party too can raise the question of title of a party to the exchange. *Sahera Khatun and another vs Anwara Khatun & others 44 DLR (AD) 86*.

120. Right and liabilities of parties—Save as otherwise provided in this Chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

Case Law

Sections 118, 119 and 120 show that the legislature has put an exchange on the same footing with a sale in almost every respect. For example, a transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale. According to section 120, each party has the rights and is subject to the liabilities of a seller as to that which he gives and has the rights and is subject to the liabilities of a buyer as to that which he takes. *1923 L 456*. Section 119 can have no reference to the case of a third person, who is not a party to the exchange and, who is not in any way bound by it. *30 NLR 208—1934 N 61*.

An exchange implies an inter-change of property with another and, except insofar as

the price may not be payable in money the rights and obligations attaching to an exchange are analogous to those of a sale, so far as the parties thereto are concerned. Third parties cannot be substituted in the place of either of them and, as such, cannot claim pre-emption. *22 ALJ 292—46 A 359*. But see *4 ALJ 756; 7 A 626*. Where an exchange transaction becomes invalid owing to some formal or other defect, no charge would arise for the value of the land exchanged. See *38 M 519—30 IC 408*. The analogy of the provisions of section 120 read with section 55(4)(b) cannot be invoked in the case of decrees based on award which itself does not contain any declaration that a charge has been created. *1936 ALJ 1328—1937 A 39*.

121. Exchange of money—On an exchange of money, each party thereby warrants the genuineness of the money given by him.